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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/942,663	08/31/2001	Shigeo Kittaka	N36-135850M/TH	7814

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EXAMINER

STOCK JR, GORDON J

ART UNIT	PAPER NUMBER
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2877

DATE MAILED: 03/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/942,663

Applicant(s)

KITAKA ET AL.

Examiner

Gordon J. Stock

Art Unit

2877

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 17 February 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: 14-27.
Claim(s) objected to: _____.
Claim(s) rejected: 1,3-13,28.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☐ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: _____.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☒ Other: See Continuation Sheet.

Gregory J. Tolley, Jr.
Supervisory Patent Examiner
3/1/2006

Continuation of 13. Other: Applicant's arguments filed February 17, 2006 have been fully considered but they are not persuasive. Firstly, the arguments on page 10 refer solely to the primary references Burt et al. (6,052,213), Inoue et al. (5,033,810), and Normandin et al. (5,111,466) without being in view of Todor et al. (6,002,522). In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In addition, on page 10 line 3-10, the argument that the particular period, a , to wavelength and average refractive index is satisfied then the photonic crystal effect is fulfilled demonstrates that Burt does fulfill the condition for it is a photonic crystal (col. 6, lines 17-35); that Inoue in view of Todor et al. fulfills the condition for it would be obvious to one of ordinary skill in the art at the time the invention was made that Inoue's structure is one dimensional photonic crystal, for the uniaxial periodic multilayer structure modulates input wavelength light and produces second order harmonic effects indicative of having a photonic band structure (refer to action 20050110: page 4); that Normandin in view of Todor et al. fulfills the condition for it is a photonic crystal for it would be obvious to one of ordinary skill in the art at the time the invention was made that Inoue's structure is one dimensional photonic crystal, for the uniaxial periodic multilayer structure modulates input wavelength light and produces nonlinear harmonic effects indicative of having a photonic band (refer to action 20050110: pages 6-7). As for Burt not working with an average refractive index for Burt uses a material with a variable refractive index in the photonic crystal in order for Burt's grating to function as a tuneable filter, Examiner disagrees. Burt states that a photonic crystal does have periodic variation in refractive index because of the differing layers (col. 1, lines 45-55), and as for not using an average refractive index Examiner disagrees; for Burt states that two different refractive indices are used (col. 2, lines 48-50); wherein, 'may have a refractive index which is variable' (col. 2, lines 60-61) does not preclude 'having a constant refractive index.' As for Normandin not working with an 'average' refractive index, Examiner disagrees, for Fig. 3 shows predominately two refractive indices with 760 angstroms predominately at the average of the two. As for Inoue not disclosing an average refractive index as claimed, Examiner disagrees. Inoue's Figure 5 demonstrates a constant refractive index of the layers for no voltage is applied as in Figs. 4a and 4b. Therefore, the layers making up the period would have two constant refractive indices.